

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 24, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP1242-CR

Cir. Ct. No. 2015CF4398

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TEEL TYRE HARGRAVES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI and FREDERICK C. ROSA, Judges. *Affirmed.*

Before Kessler, Brash and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Teel Tyre Hargraves appeals from the judgment of conviction entered upon a jury’s verdict finding him guilty of being a felon in possession of a firearm. He also appeals an order of the circuit court denying his postconviction motion seeking a new trial. Hargraves’s arguments concern the admission of evidence relating to an anonymous 911 call that relayed the description of an individual with a gun. Hargraves asserts that the evidence relating to the call was testimonial hearsay and violates his right to confrontation. Hargraves further contends that even if the evidence is not hearsay, its probative value is outweighed by its unfair prejudice, and therefore it should have been excluded.

¶2 The State maintains that the evidence was not hearsay because it was not admitted to prove the truth of the matter asserted, but that even if it was erroneously-admitted hearsay, it was harmless error. The State further argues that the evidence was nontestimonial, and therefore there is no Confrontation Clause violation. Finally, the State asserts that the evidence was relevant to the police officers’ states of mind and was not unduly prejudicial.

¶3 We conclude that the 911 description was properly admitted for the limited purpose of providing context for the circumstances of the case, and although the State went beyond the scope of that purpose in its closing argument, those arguments are not evidence upon which an admissibility challenge can be based. We therefore affirm.

BACKGROUND

¶4 On September 25, 2015, around 6:00 p.m., the Milwaukee Police Department received a 911 call that a young African-American male wearing all-black clothing and “snakeskin[-]looking shoes” was armed with a gun and walking

in the vicinity of West Wright Street and North 44th Street. Two officers who were in the area responded and observed an individual meeting that description, who was later identified as Hargraves. The officers observed what appeared to be a black handgun in Hargraves's right hand.

¶5 The officers got out of their squad car and attempted to make contact with Hargraves, ordering him to stop. Hargraves continued to walk away from the officers. The officers were able to confirm that Hargraves was holding a black handgun, and they observed him trying to conceal it in the waistband of his pants. Hargraves fled into an alley and the officers gave chase on foot.

¶6 During the chase, the officers observed Hargraves throw the gun into the backyard of a residence on North 46th Street. The officers were able to catch Hargraves a couple houses down from there, and took him into custody. One of the officers then returned to the backyard where they had seen Hargraves discard the gun and retrieved it. The gun they found was a black Hi-Point .45 caliber handgun with one round in the chamber and seven rounds in the magazine.

¶7 It was discovered that Hargraves had previously been convicted of a felony. He was then charged with possession of a firearm by a felon. This was the sole charge against him.

¶8 The matter proceeded to a jury trial.¹ Prior to the trial, Hargraves's trial counsel raised an objection to any references to the description of the

¹ The jury trial was before the Honorable David L. Borowski, and we refer to that court as the "trial court." The matter was then reassigned to the felony gun court for Hargraves's postconviction motion, with the Honorable Frederick C. Rosa presiding; we refer to that court as the "postconviction court."

individual with the gun as provided by the 911 caller; the description had been transmitted to the police officers over their radio, which was later printed out as a “computer aided dispatch” (CAD) report. He argued that the description set forth in the CAD report was testimonial hearsay, and that its admission would violate Hargraves’s right to confrontation. In contrast, the State argued that the description would not be offered to prove the truth of the matter asserted, but rather to explain why the police officers went to that particular location and made contact with Hargraves. The trial court agreed with the State, and allowed the evidence to be admitted for the limited purpose of explaining the context of the officers’ actions.

¶9 At trial, the State called Officer David Grycowski, one of the officers who responded to the 911 call and arrested Hargraves. He testified that on September 25, 2015, he and his partner had responded to a dispatch regarding a subject with a gun. They were given the description of a young black male, wearing all black and snakeskin shoes, going westbound on Wright Street with a gun in his hand. Officer Grycowski testified that when they arrived, there was only one individual in that area, that he matched the description given by dispatch, and that he had a “black L-shaped object” in his hand that they believed was a handgun.

¶10 Officer Grycowski further testified that when they were chasing Hargraves, he came within five feet of Hargraves and was able to confirm that Hargraves had a handgun in his hand. He also stated that he was about ten feet away when he saw Hargraves throw the gun over a fence into the backyard of a residence on North 46th Street. Officer Grycowski confirmed that it was still light out during this time, and that he never lost sight of Hargraves during the chase.

¶11 The State also called Officer Eulia Kazachenko, who was working with Officer Grycowski that evening. Her testimony was consistent with the events as stated by Officer Grycowski. Officer Kazachenko recovered the gun from the backyard of the 46th Street residence while Officer Grycowski and other assisting officers took Hargraves into custody.

¶12 Additionally, the State called Investigator Dawn Veytsman of the Milwaukee Police Department, a forensic investigator. She had processed the recovered handgun for fingerprints and found none. She also submitted swabs from the gun and sent them to the Wisconsin State Crime Lab for DNA analysis; however, the amount of DNA available was not sufficient to perform an analysis.

¶13 In its closing argument, the State referred to the description that Officer Grycowski and Officer Kazachenko received from dispatch:

On this particular day they're on duty as police officers. They're driving around their designated area. They get a dispatch that says that they are to report to 44th Street and Wright Street because there is a black male wearing all black walking down the street with a firearm in his hand.

Officers arrive to that location, and what do they see? Exactly what dispatch told them they would see. They see the defendant walking down the street wearing all black with an L-shaped object in his hand.

....

I do find the officers' testimony, both of them, extremely credible. They've done this before. There's no reason to tell any other story. But the dispatch said that this person would be standing in this exact location wearing all black with a firearm. And that is exactly what officers see when they get to that location, is the defendant with a firearm in his hand. So I urge you guys to come back with a guilty verdict.

¶14 Hargraves’s trial counsel did not raise any objection regarding the State’s closing argument. The jury returned a guilty verdict.

¶15 Hargraves filed a postconviction motion seeking a new trial. He argued that his confrontation right was violated when the court allowed the admission of the CAD report, because the 911 caller’s statements set out in the report were used to prove the truth of the matter asserted and were testimonial hearsay. He further asserted that the admission was not harmless error because it affected the outcome of the trial. Even if not deemed to be hearsay, Hargraves argued that the evidence was unduly prejudicial, and thus should have been excluded.

¶16 The postconviction court rejected Hargraves’s arguments. It stated that based on the holding in *Davis v. Washington*, 547 U.S. 813 (2006), 911 calls are nontestimonial because they are primarily utilized by police in their investigations. The postconviction court further determined that since the CAD report had been properly admitted, there was “nothing objectionable about the State’s closing argument.” This appeal follows.

DISCUSSION

¶17 Hargraves reiterates his postconviction motion arguments on appeal with regard to the admission of the suspect’s description in the CAD report. “When reviewing a question on the admissibility of evidence, an appellate court must determine whether the court exercised its discretion in accordance with accepted legal standards and with the facts of record.” *State v. Brecht*, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988). This court will uphold a discretionary decision “if the [trial] court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion

that a reasonable judge could reach.”” *Hefty v. Strickhouser*, 2008 WI 96, ¶28, 312 Wis. 2d 530, 752 N.W.2d 820 (citation omitted).

1. Prosecutor’s Statements in Closing Argument

¶18 In our review of the record, we agree with the trial court’s initial determination that the description of the suspect provided in the CAD report was properly admitted for the limited purpose of explaining why the police officers went to that location and made contact with Hargraves. However, in its closing argument, the State used the description to bolster the testimony of the officers and attest to their credibility, which went beyond the limited scope set by the trial court. Although utilizing the CAD report description in this manner was an improper argument on the part of the State, because this occurred during closing argument, any statements improperly referencing the CAD report description are not evidence.² See WIS JI—CRIMINAL 160; see also *State v. Mayo*, 2007 WI 78, ¶44, 301 Wis. 2d 642, 734 N.W.2d 115. The trial court instructed the jury on this point, and courts are “required to presume the jury obeyed the instructions as given.” *State v. Abbott Labs.*, 2012 WI 62, ¶103, 341 Wis. 2d 510, 816 N.W.2d 145.

¶19 Furthermore, any error stemming from that improper argument was harmless. “Generally, an error is harmless if there is no reasonable possibility that it contributed to the conviction,” that is, “one sufficient to undermine confidence in the outcome of the proceeding.” *State v. Tulley*, 2001 WI App 236, ¶7, 248

² Based on this analysis, Hargraves’s argument that the 911 caller’s description was testimonial hearsay is unavailing since we conclude that it is not hearsay evidence. We therefore do not discuss that argument.

Wis. 2d 505, 635 N.W.2d 807. We consider challenges to closing arguments in the context of the trial, not in isolation. *See Mayo*, 301 Wis. 2d 642, ¶43.

¶20 Here, the State had a very solid case against Hargraves based on the testimony of the police officers. Both Officer Grycowski and Officer Kazachenko gave detailed, consistent accounts of their contact with, and subsequent arrest of, Hargraves. The description of the suspect given by dispatch was only referenced to set the context for the officers' initiation of contact with Hargraves. Their testimony—that they saw Hargraves with the gun in his hand, saw him throw the gun, and then recovered the gun from the backyard into which they saw him discard it—was sufficient to establish the possession element of the crime. *See WIS JI—CRIMINAL 1343*. In other words, the CAD report description was not ultimately what led the officers to arrest Hargraves; it was the fact that when the officers got to the scene, they saw Hargraves with a gun, and he then fled from them. Moreover, Hargraves offered no testimony to contradict the officers' accounts.

¶21 In sum, the element of possession was established prior to the State's closing argument. Therefore, we find that any error by the State in its reference to the description in the CAD report during its closing argument did not contribute to the verdict, and was thus harmless.³ *See Tulley*, 248 Wis. 2d 505, ¶7.

³ The issue of whether Hargraves's trial counsel was deficient in his failure to object during the State's closing arguments is not before this court; however, we note that an ineffective assistance of counsel claim would fail due to our finding that Hargraves was not prejudiced by any possible error on the part of his counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

2. Relevance of the Description in the CAD Report

¶22 Hargraves also contends that even if the suspect’s description in the CAD report is found to have been admitted for a non-hearsay purpose, its probative value was substantially outweighed by unfair prejudice and thus should have been excluded. *See* WIS. STAT. § 904.03(2015-16).⁴

¶23 “[A]ny fact which tends to prove a material issue is relevant, even though it is only a link in the chain of facts which must be proved to make the proposition at issue appear more or less probable.” *State v. Pharr*, 115 Wis. 2d 334, 346, 340 N.W.2d 498 (1983) (citation omitted). In fact, “[r]elevancy is not determined by resemblance to, but by the connection with, other facts.” *Id.* (citation omitted). Furthermore, in making a decision on relevancy, the trial court should “consider the proponent’s need to present this evidence given the context of the entire trial.” *State v. Marinez*, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399. We will uphold a trial court’s relevancy determination unless we find that the court erroneously exercised its discretion. *See Pharr*, 115 Wis. 2d at 345.

¶24 Even if evidence is relevant, it may still be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” WIS. STAT. § 904.03. “Evidence is prejudicial if it has a tendency to influence the outcome by improper means ... or otherwise causes a jury to base its decision on something other than the established propositions in the case.” *State v. Jackson*, 216 Wis. 2d 646, 667, 575 N.W.2d 475 (1998) (citation omitted).

⁴ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶25 To be clear, the test set forth in WIS. STAT. § 904.03 “is not whether evidence is prejudicial but whether it is *unfairly* prejudicial.” *State v. Mordica*, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992). In other words, “[u]nfair prejudice’ does not mean damage to a party’s cause, since such damage will always result from the introduction of evidence contrary to the party’s contentions.” *Id.* (citation omitted). Rather, a determination of unfair prejudice focuses on whether the outcome was influenced “by *improper* means.” *Id.*

¶26 As discussed above, we have already found that the description as set forth in the CAD report was properly admitted as the context for the police officers’ initial contact with Hargraves. Furthermore, even when the State went beyond this purpose in its closing argument, we have concluded that any error was harmless because it did not affect the outcome of the case. Based on that analysis, we reject Hargraves’s argument that the evidence was unfairly prejudicial. *See Jackson*, 216 Wis. 2d at 667.

¶27 We therefore affirm Hargraves’s judgment of conviction as well as the postconviction court’s denial of his motion for a new trial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

